

APPENDIX J
WARTIME MILCON FUNDING

1. The purpose of this appendix is to outline the basics of military construction (MILCON) funding as they may apply to contingency construction. Funding for operations support (logistics, engineering, payroll, transportation, etc.) is a Service responsibility. It is the responsibility of the Service component commands (the supporting Army MACOM) of the combatant commanders to provide funding for the Army's mission.

2. The following subparagraphs are keyed to Title 10, United States Code, Sections 2801-2808. These sections apply to all construction in support of U.S. forces. They do not apply to construction in support of others (e.g.; refugee camps, drug interdiction camps for the Drug Enforcement Agency, and facilities for coalition forces).

a. **Section 2801** defines MILCON. It is an all inclusive definition; i.e., there are no exceptions for wartime.

(1) MILCON "...includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation."

(2) A MILCON project "...includes all military construction work, or any contribution authorized by this chapter, necessary to produce a complete and usable facility ... or improvement as is specifically authorized by law."

(3) Facility "... means a building, structure, or other improvement to real property."

(4) Military installation "... means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of Defense."

b. **Section 2802** defines the included phases/components of a MILCON project from surveying through construction.

c. **Section 2803, "Emergency Construction"** provides the Service Secretaries with the authority to reprogram unobligated MILCON appropriations to projects urgently required for "national security."

(1) The fiscal year limit is \$30 million.

(2) The Service secretary must submit a written report to the committees on his/her decision to invoke this authority.

(a) For each project, the report must include the project justification, cost estimate, and a statement on the source of funds. The source of funds must be from a previously authorized and funded MILCON project(s).

(b) From the day the Service secretary submits the report to the committees (four committees, two each in the House and Senate), the committees have 21 calendar days to disapprove the project(s).

d. **Section 2804, "Contingency Construction"** is similar to Section 2803. However, this section applies only to appropriations specifically provided under this section of law. Since no funds have been appropriated under this provision of law in recent years, it has not been applicable to military operations to date.

e. **Section 2805, "Unspecified Minor Construction"** provides for several programs which have limited authority and relatively small appropriations. Fundamental to this section is the \$1.5M limitation to project costs. The projects which meet the criteria of this provision are submitted by the Service MACOM prior to the beginning of the fiscal year. There are always more requirements than funds available. As a result, the total amount appropriated is committed to projects at the beginning of the fiscal year.

(1) The Service secretary must approve projects costing more than \$750,000 and notify the committees in much the same way that is required in Section 2803.

(2) Exercise Related Construction (ERC) is covered here. The aggregate amount appropriated for ERC is also limited. The Joint Staff administers the program. Again, any project

costing more than \$750,000 must be "approved in advance by the Secretary concerned."

(3) Subparagraph (c)(1) provides for the use of Operations and Maintenance (O&M) funds to execute MILCON projects. The current limit is \$300,000. There are two key elements here. First, OMA funded projects do not get visibility in Congress or the Pentagon. Second, OMA funded projects are still MILCON. See paragraph 4, below for additional discussion on the use of OMA for contingency projects.

f. **Section 2806** applies only to contributions for NATO infrastructure.

g. **Section 2807** authorizes the expenditure of MILCON funds for the use of A&E firms and construction design not otherwise authorized by law.

h. **Section 2808**, "Construction authority in the event of a declaration of war or national emergency" is crucial to any major contingency. It allows the SECDEF and the Service Secretaries to reprogram their unobligated MILCON funds for construction projects, not otherwise authorized by law, to support the U.S. armed forces. The MILCON funds may be applied to requirements in support of any CINC.

(1) Congress must be notified, but there is no waiting period. The SECDEF must notify the committees of the decision and estimated costs, including real estate costs.

(2) Since the SECDEF has to report on the contingency projects, it is very likely that the Service secretaries will require DD Forms 1391 as the reporting format. The standard eleven paragraphs should be completed, but not in detail. This includes a brief general description of the requirement, standard of construction, and estimated costs. The justification should include a brief statement on the urgency and importance to the mission. Generally, technical details are not required; the goal is to provide enough data to satisfy the questions of the Service secretaries and to provide a report to Congress.

(3) As soon as an operation seems imminent, the CINC will make clear to the SECDEF his/her anticipated need of construction. Section 2808 must be specifically included in the

construction. Section 2808 must be specifically included in the executive order that initiates the declaration of war or national emergency; it is not automatic. As part of an emergency order, it must be approved by the Secretaries of State, Justice, and Treasury; the Director of Central Intelligence, and the Office of Management and Budget prior to submission for the President's signature. This takes time, therefore, the CINC will not wait for an actual project(s) to be identified prior to requesting that this provision be invoked.

3. A Deputy Assistant Secretary of the Army for Army Budget (SAFM-BUC-E) message, DTG 241808Z December 1992, subject: "Operation RESTORE HOPE (#2) Cost Estimates" revised Army policy with regard to the use of OMA funds in support of contingencies. It states: "Operations and maintenance funds are the appropriate funding source to be utilized for acquisition of materials and/or cost of erection of structures which are clearly of a temporary operational nature and intended to be used for only a temporary period by operational forces as required to facilitate operations in connection with the Somalia relief effort and which will not be used to sustain permanent or contingency operations at the conclusion of the relief effort. MILCON criteria apply to all other situations, including construction for which the United States would have a follow-on or contingency use after the termination of the military operations necessitating the construction." While this guidance was provided in support of a specific event, it applies to all subsequent operations in support of Army forces.

a. Therefore, the following conditions must be met to use OMA funding for projects whose costs would otherwise exceed the OMA funding limitations for construction as specified in Section 2805, above.

(1) The construction must be clearly of a temporary nature; not just used temporarily. Some types of commercial building systems which have a relatively long economic life would still be subject to the provisions of Title 10 Section 2805(c)(1) even though the intent is for temporary use.

(2) The project(s) intent must be for use only during the temporary period by operational forces. This means that the project(s) will not be used to sustain operations beyond the end of the contingency for which it was constructed. Care must be taken with regard to any declaration that a given contingency has

been concluded and that a sustained operation is in effect. Once a continuing (not necessarily permanent) presence is established, the provisions of Title 10 USC, Section 2805(c)(1) apply (per paragraph 2e(4) above).

(3) The project is not on a U.S. owned or operated installation nor an installation with a continuing U.S. presence.

b. All the provisions of MILCON apply with regard to modification of or improvements to existing host nation facilities for use by U.S. forces. An example of a modification requiring appropriated funds (e.g., Military Construction, Army (MCA)) would be the installation of air conditioning, associated up-graded wiring, and insulation to a leased warehouse structure which exceeds the limits for OMA funding per Title 10, USC 2805(c)(1). In this example, the intent may be for temporary use but, as with improvements to any leased structure, the improvement(s) remain with the structure after use and are therefore subject to the provisions of Title 10 USC, Section 2805(c)(1).

4. In theater, the USACE commander may have customers from other Services. The issue of the use of their appropriations (military construction or operations and maintenance) is the same as for the Army. However, their guidance may vary from that of the Army which is reflected above. If the differences can not be quickly and successfully resolved in theater, the USACE commander must quickly advise the USACE chain of command. As a DOD Contract Construction Agent, USACE must take great care to execute its missions within the law.